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May 31, 1994

BURTON W. OLIVER
Executive Director

Mr. M--- C---
W--- F--- M---
XXXX --- Avenue
---, California XXXXX

Re: SY -- XX-XXXXXX
Distilled Water & Herbs

Dear Mr. C---:

I am answering your letter to me of April 15, 1994. You ask for an opinion regarding the application of sales tax to your market's sales of distilled water and bulk herb teas. You note that sales of many of your herbs are subject to tax when the herbs are sold in capsule form. You ask if the same rule applies when the herbs are sold in leaf, stick, powder, granular, or root form. You also ask about some packaged and bulk teas the labels of which do not make specific medicinal claims, but carry names such as Relaxing Tea, Breathe-Free, Calming Tea, Laxative Tea, Cold & Flu Tea, etc. You ask if sales of these teas are subject to tax, and if so, what is the determining factor.

OPINION**A. Sales and Use Tax Generally.**

In California, except where specifically exempted by statute, Revenue and Taxation Code Section 6051 imposes an excise tax, computed as a percentage of gross receipts, upon all retailers for the privilege of selling tangible personal property at retail in this state. (Unless otherwise stated, all statutory references are to the Revenue and Taxation Code.) "[I]t shall be presumed that all gross receipts are subject to tax until the contrary is established. The burden of proving that a sale of tangible personal property is not a sale at retail is upon the person who makes the sale ..." (§ 6091.) "Exemptions from taxation must be found in the statute." (Market

St. Ry. Co. v. Cal. St. Bd. of Equal. (1953) 137 Cal.App.2d 87, 96 [290 PO.2d 201.] The taxpayer has the burden of showing that he clearly comes within the exemption." (Standard Oil Co. v. St. Bd. of Equalization (1974) 39 Cal.App.3d 765, 769 [114 Cal.Rptr. 571].)

B. Food Products Exemption

Section 6359, as interpreted and implemented by Regulation 1602, provides an exemption from sales and use taxes for sales of food products for human consumption under certain circumstances. Sub-divisions (1) & (2) of Regulation 1602(a) contain lists of products which, either singly or in combination, are considered "food products." (Sales and Use Tax Regulations are Board promulgations which have the force and effect of law.) Sub-division (a)(5), however, excludes certain items from the definition of "food products" as follows:

"(5) 'Food products' do not include any product for human consumption in liquid, powdered, granular, tablet, capsule, lozenge, or pill form (A) which is described on its package or label as a food supplement, food adjunct, dietary supplement, or dietary adjunct, and to any such product (B) which is prescribed or designed to remedy specific dietary deficiencies or to increase or decrease generally one or more of the following areas of human nutrition:

1. Vitamins
2. Proteins
3. Minerals
4. Caloric intake"

In interpreting and implementing the broad provisions of Section 6359(c), Regulation 1602(a)(5) thus sets up a two-step analysis. The threshold question is whether or not the food product under discussion is in one of the enumerated forms- liquid, powdered, granular, tablet, capsule, lozenge, or pill. If so, then its sales are taxable if one of the two following conditions also occurs: (A) its label or package describes it as a food supplement, food adjunct, dietary supplement, or dietary adjunct; or (B) it is prescribed or designed to remedy specific dietary deficiencies or to increase or decrease generally the intake of vitamins, protein, minerals, or calories.

C. Tax Consequences to Whole Foods Market.

1. Distilled Water.

Sales of sterile water have long been considered taxable. (Annot. 245.1070. Sales and Use Tax Annotations are excerpts from previous Legal staff opinion letters and serve as a guide to staff positions.) Our research indicates that the majority of distilled water is still sold for purposes other than consumption by humans even though it is sold alongside regular bottled

water. Generally, when it is sold for human consumption it is sold for its medicinal qualities, such as an aid to digestion. Medicines are excluded from the definition of "food products" under Regulation 1602(a)(4). Therefore, sales of bottled distilled water are subject to tax.

2. Bulk Herbs.

You list Brewer's yeast, Chamomile, Valerian, Echinacea, Spirulina, Bee Pollen, Goldenseal, and Immuni-Tea as being of special concern. Regulation 1602(a)(5) mentions brewer's yeast as an example of an unusual food, sales of which are exempt from tax unless its label terms it a food adjunct or unless medicinal claims are made for it. We have previously concluded that spirulina and bee pollen are food products, unless they fall into the same categories. We have also previously concluded that herbs and herb teas for which medicinal qualities are claimed are excluded from the definition of medicines under Regulation 16023(a)(4). (Annot. 245.0500, 245.1091.) Immuni-tea appears to be a concoction of medicinal herbs. The other listed herbs are well-known as herbal medicines: Chamomile as an antispasmodic or a diaphoretic; Valerian as a carminative and sedative; Echinacea for treatment of ulcers and boils; and Goldenseal as an alterative and a tonic. We infer from your statement that sales of spirulina, brewer's yeast, and bee pollen in capsule form are subject to tax and your listing them in conjunction with the medicinal herbs that medicinal claims are made for these products also.

Based on the above conclusions, these herbs and preparations are sold for their medicinal value. As noted above, medicines are excluded from the definition of "food products" under Regulation 1602(a)(4). The limitations as to the form of the product found in sub-division (a)(5) do not apply to (a)(4). Therefore, sales of these products are subject to tax under the above authority.

I hope the above discussion has answered your questions. If you need anything further, please do not hesitate to write again.

Sincerely,

John L. Waid
Tax Counsel

JLW:es

cc: San Jose District Administrator